IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

No. 561 - 562

UNITED STATES OF AMERICA

v.

HAROLD GOTTFRIED and PURE ROCK MINERAL SPRINGS CORPORATION,

Petitioners.

UNITED STATES OF AMERICA

v.

HAROLD GOTTFRIED, JOSEPH FORMAN and WILLIAM STANTON,

Petitioners.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

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To the Honorable, The Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The petitioners, Harold Gottfried, Pure Rock Mineral Springs Corporation, Joseph Forman and William Stanton, respectfully pray that a writ of certiorari issue to review the final judgments of the United States Circuit Court of

Appeals for the Second Circuit, affirming several judgments of the United States District Court for the Southern District of New York adjudging the petitioners guilty after conviction and fixing sentences.

Petitioners Gottfried and Pure Rock Mineral Springs Corporation were convicted of having made and filed false and fraudulent statements in the matter of sugar consumption to the O.P.A. Petitioners Gottfried, Forman and Stanton were convicted of conspiracy to defraud the United States, in procuring a false report to be filed, and by depriving it of the faithful services of its investigator.

Petitioners join their several requests for a writ of certiorari pursuant to Rule 48 of the Rules of this Court.

Opinion Below.

The opinion of the Circuit Court of Appeals, dated January 2, 1948, appears at R., p. 2462 and is reported at ..... Fed. (2) ..... The judgments of the District Court appear at R. 2428-2435.*

Statement of Matter Involved.

Petitioners Gottfried and Pure Rock Mineral Springs Corporation were indicted in two counts for violating *Title 18, Section 80, U. S. Code.* The first count charged that the defendants had fraudulently overstated to the O.P.A. their sugar consumption for 1941; the second count charged the defendants with fraudulently certifying to that fact.

In a second indictment, consolidated for trial with the above, petitioners Gottfried, Forman, and Stanton were

*Unless otherwise indicated, all numeral references hereafter will indicate folios in the record.

charged with having conspired, together with one George Long, in violation of *Title 18, Section 88, U. S. Code,* to defraud the United States of the faithful services of Stanton, an O. P. A. investigator. The indictment alleges that after Stanton had been assigned to investigate the statement which Pure Rock had filed with O. P. A., Gottfried paid Forman $1,500 in order to get Stanton to quash the investigation, and that Stanton's subsequent report falsely exonerated Gottfried and Pure Rock (R., pp. 13-28).

Pure Rock is a corporation, located in Ellenville, Ulster County, New York, and engaged in bottling and distributing soft drinks (393-4). Gottfried, during most of the time involved herein, was president and sole stockholder of Pure Rock (854). Forman, an attorney, practicing in Ulster County, had occasionally acted as counsel for Pure Rock (4576, 4581, 5184, 5367). Stanton was, in 1942-1943, an O. P. A. investigator, who made the Pure Rock investigation (71, 2383, 2529, 3705), and who resided in Ulster County. Gottfried had varied business interests and never assumed the direct management of Pure Rock, employing managers (Dwyer, succeeded by Long) for that purpose, visiting the plant at Ellenville only on occasion, and drawing no salary (2576, 3164-68, 4126-7, 4507, 4301-3, 2577-8, 4515).

The essence of the offenses, as presumably found by the jury, is as follows: In April, 1942, Dwyer, then manager of the plant, sent to Gottfried, then on active military service at Sheepshead Bay, New York City, a filled-in form for sugar registration, for his signature, because the president's signature was required (4526-7). Gottfried signed the statement and it was filed with the O. P. A. on April 29, 1942 (263-4). A year later, O. P. A. received an anonymous letter alleging the statement to be false in that it doubled the amount of sugar the company had used in 1941 (2381, 3506).

Stanton was assigned to investigate (2381), and saw Long, who was then in active management of the company. Long called Gottfried (1631) and told him of the pending investigation, and was told that the 1941 sugar base was inflated. Gottfried then retained Forman to represent him. Long met with Forman, who said that he could adjust the matter and asked for $1,500 (1641, 1643-5). Subsequently, Gottfried and Long met with Forman at the Hotel Pierre in New York (1653) and later Gottfried gave Long $1,500, which was paid to Forman. Stanton filed a report with O. P. A. that the sugar registration statement in question was correct (1664). Forman paid him $200.

At the trial on the consolidated indictment, the principal evidence for the prosecution was the testimony of Dwyer and Long, and an allegedly "voluntary" statement by Stanton which implicated Forman although not admitted as to him. All of the defendants took the stand and squarely contradicted Dwyer and Long. There was evidence that Dwyer and Long had been stealing from Gottfried (Dwyer, 1215, 4130-4, 4388-9, 4391-2, 4399-4405; Long, 1710, 1733, 1738, 1769-72, 1800, 1805, 1827-29, 1957, 1963, 4612-39), and that Long had attempted to blackmail Gottfried when the latter compelled him to make partial restitution (1837-8, 1844-7, 1720-1, 1836-7). Stanton's statement was obtained under circumstances set forth below, which make its admission one of the issues for which review is sought.

The defendants objected before and at the trial to the composition of the grand and trial juries (85-95, 226, 241-244, 3458, 3465, 6512, 6523, 6879-80). The lists of jurors systematically exclude all but three counties of the eleven in the Southern District (155-9, 201, 7216). These three are the Metropolitan counties of New York and Bronx (New York City) and Westchester (adjoining New York City).

The scene of the alleged offenses, the place of business of the corporate defendant, and the residences of Forman and Stanton and of their character witnesses, were all in Ulster County, which is excluded from the Southern District jury list.

Another issue revolves around the foreman of the jury, Van Voorhis. In the course of the trial, Gottfried's counsel had charged this juror with having falsely answered on the *voir dire,* but the trial judge refused to excuse him until the conclusion of the trial (6846). Subsequently, Van Voorhis was accused of misconduct, and of having improperly entered the jury room and communicated with other jurors *after having been excused* (5345-9, 6495-6500). The trial court refused to conduct an inquiry into such prejudicial misconduct, although it was promptly requested (6847, 6955, 6876, 6899).

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended (28 U. S. C. A., Section 347(a)).

Questions Presented.

(1) Were the petitioners deprived of a fair trial, and their rights under the Fifth and Sixth Amendments to the Constitution, by reason of the systematic exclusion from jury service of residents of eight rural counties of the eleven counties comprising the Southern District, and by restrictive and discriminatory selection of jurors solely from the three counties of the metropolitan New York area, i.e., New York, Bronx, and Westchester (Point I, *infra.*).

(2) Were the petitioners denied a fair trial, and deprived of their rights under the Fifth and Sixth Amendments, by reason of the trial court's refusal to excuse the foreman of the jury, after discovery that he had answered falsely on the *voir dire*, until the jury was about to retire; and the refusal by the courts below of petitioners' requests for an inquiry into alleged prejudicial and improper influence on the jury by the above foreman, *after* he had been excused, arising from the presence of the discharged juror in the jury room while the jurors were deliberating upon the evidence, and improper and prejudicial statements made by the discharged juror (Point II, *infra.*).

(3) Were the petitioners deprived of a fair trial by the admission into evidence of an alleged statement in the nature of a confession by the defendant Stanton, procured through

(a) misuse by the government of the writ of habeas corpus *ad testificandum*.

(b) denial to defendant Stanton, while a prisoner in confinement, of the right to counsel, in regard to new charges.

(c) improper and incorrect legal "advice" to Stanton by government counsel while in the custody of the government, and also in the presence of the grand jury; and improper instruction by the foreman of the grand jury acting on advice of government counsel (Point III, *infra.*).

(4) Were the defendants denied a fair trial by reason of the consolidation for trial of the indictment charging conspiracy against petitioners Forman, Gottfried and Stanton, with the indictment against Pure Rock Mineral Springs and Gottfried for an earlier and distinctly separate substantive offense.

(5) Were petitioners Gottfried and Forman deprived of a fair trial by the denial to them of a severance upon the admission, as against Stanton alone, of the alleged "confession".

(6) Was prejudicial and reversible error committed by the trial court in permitting cross-examination of Stanton concerning his reasons for having claimed constitutional privilege against self-incrimination when questioned before the grand jury.

(7) Did the Statute of Limitations bar the indictment founded on the fraudulent written statement.

Petitioners assign as error the negative answers of the Court below to the foregoing questions.

Reasons for Granting the Writ.

I.

The petitioners were deprived of a fair trial and their rights under the fifth and sixth amendments because of the exclusion from jury service of residents of eight of the eleven counties in the district, and the discriminatory selection of jurors solely from the three counties of metropolitan New York.

Petitioners, before the trial, at its inception, and at the close, challenged the array of grand and petit jurors on the ground that residents of only three of the eleven counties in the district were called for jury service (85, 95, 226, 241-2, 244, 3458, 3465, 6512, 6523, 6879-80).

The testimony of the clerk and deputy clerk of the district court, at a hearing held on motions before trial, estab-

lished that the names of prospective jurors eligible for jury service in that district are selected from the registered voting lists, and the telephone directories of New York, Bronx and Westchester Counties (155-6, 160). These sources are the sole sources used to find names of prospective jurors, although residents of other counties may occasionally volunteer for service.

Lists of the panels called from 1940 to 1946 (7216) show that altogether about 42,000 persons were summoned for petit jury service during that period; that only seventy of them lived outside of New York, Bronx and Westchester, and none in Ulster or Orange; and that of these seventy, all but *thirteen* were listed in the New York City telephone directory (206-8). For the same period about 9,500 grand jury veniremen were called; only thirty-nine of them resided in a county other than New York, Bronx or Westchester; and of these latter only *four* had no listing in the New York City telephone book (209-10).

The jurisdiction of the court below extends to the counties of Columbia, Dutchess, Greene, Orange, Putnam, Rockland, Sullivan and Ulster, in addition to New York, Bronx and Westchester. *Title 28, section 178, United States Code.* It is beyond dispute that the residents of the eight counties first named are systematically and intentionally excluded from jury service.

Thus, in a district comprising approximately 6,100 square square miles, there have been excluded all persons resident in approximately 5,500 square miles, with the result that all jurors save those who volunteer are drawn from approximately six hundred square miles (World Almanac, 1946, 744). The effect is to [illegible]ve defendants of trial by residents of 90% of the area [illegible] district. On a popula-

tion basis, this represents an exclusion of 545,779 persons (World Almanac, 1946, 477).

This Court may take judicial notice of the fundamental differences which exist in the economic, social, ethnologic, psychological, educational and occupational characteristics —in short, in every sphere where significant differences can exist—between the urban population within the Metropolitan Area of New York City and the residents of the rural counties outside the Metropolitan Area, excluded from jury service.

The eight up-State counties excluded consist in the main of farming communities and towns and villages.

Consequently, the systematic exclusion of residents of these counties is not only a *geographical* exclusion; it is an exclusion of an *entire and different group or class* from the petit and grand jury lists, and operates to deprive a defendant of a jury selected from a cross-section of the population of the district.

The exclusion of *any* significant group of the community from jury service is a ground for reversal. *Ballard* v. *United States,* 329 U. S. 187 (1946); *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217 (1940); *United States* v. *Glasser,* 315 U. S. 60 (1942).

Geographical discrimination alone would appear to justify reversal for, as stated in the *Thiel* case (329 U. S. at 220):

> "The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury *drawn from a cross-section of the community.* Smith *v.* Texas, 311 U. S. 128, 130; Glasser *v.* United

> States, 315 U. S. 60, 85. This does not mean, of course, that every jury must contain *representatives of all the economic, social, religious, racial, political and geographical groups of the community;* frequently such complete representation would be impossible. But it does mean that prospective jurors shall be selected by court officials *without systematic and intentional exclusion* of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society. Jury competence is an individual rather than a group or class matter. The fact lies at the very heart of the jury system. To disregard it is to open the door to class distinction and discrimination which are abhorrent to the democratic ideals of trial by jury." (Italics added.)

In the instant case, not only was there "systematic and intentional exclusion" of *geographical* groups of the community, but as a necessary consequence, economic, social and political groups as well.

Certainly when persons from the rural part of the district (e.g., Forman and Stanton) are on trial for a transaction which originated there, it falls short of the requirements of the Constitution and the standard set by this Court to subject such defendants to the verdict of jurors with an exclusively metropolitan background, who are strangers to him in outlook and living habits. Especially is this true in a criminal case, where character witnesses (here from the rural areas) are an important element of the defense. *United States* v. *Johnson,* 323 U. S. at 279. Such procedure deprives the jury institution of its very essence by opening the door to class distinctions.

No refinement of statistics can justify the exclusion of the up-State jurors, even if geography were the only ele-

ment; certainly no basis has been shown for ignoring the other elements traditionally associated with the concept of a jury of the vicinage. The effect of the decision below is not only to condone the "long practice" in the past, but to sanction it in perpetuity.

The government has sought to justify this restrictive, exclusionary, and discriminatory method of selecting jurors by reference to an old statute (Judiciary Act of 1789, 1 St. at L. 88, Title 28, Sec. 413, U. S. C.) which authorizes the courts to limit jury lists. However, in *May* v. *United States*, 199 Fed. 53, 59 (C. C. A. 8, 1912), cert. den. 229 U. S. 617, it was held in reference to this statute that, without an order of the court directing such division, the jurors must be chosen from the entire district. The opinion of the court below brushes the *May* case aside on the ground urged by the government below (Brief, p. 23) that it has been overruled by *Lewis* v. *U. S.*, 279 U. S. 63.

No such problem was presented in the *Lewis* case, which dealt with the special transitory situations arising from the creation of a new judicial district. In such cases, section 59 of the Judicial Code (Sec. 121, Tit. 28, U. S. C.) provides for transfer to the new district on application, and the defendant expressly disclaimed any desire to be tried there (see opinion below, 22 F. (2d) at 764).

The presumption of regularity established by the *Lewis* case should not be extended to a case such as this where the absence of an order is conceded. Indeed, the *Lewis* case turned precisely on the fact that *there was no express absence of an order.* The Court in that case observed (at 73): "And even if it can be regarded as essential (under the statute) * * * that the judge should have given written direction to draw the jurors from part of the district only, still,

as the contrary is not expressly shown, such a direction may be taken as sufficiently established by the presumption of regularity. See *Steers* v. *U. S.*, 112 C. C. A. 423, 192 Fed. 1, 4." (Italics added.)

All the more should it not be extended to a case such as this where such an order could not have been entered consistently with the applicable statute or the Constitution. The statute, while relaxing the requirement that jurors must be drawn in all instances from the entire district, authorizes the doing so only in such manner "so as to be most favorable to an impartial trial, and so as not to incur any unnecessary expense, or unduly burden the citizens of any part of the district with such service." It is made plain that convenience is not an alternative to impartiality but is subservient to it. Impartiality is *first* demanded, and only thereafter is convenience to be considered.

The statute never contemplated, and does not authorize, an order permanently truncating a judicial district containing eleven counties into only three counties for jury purposes. This is clear from the language of the section itself; it is supported by related provisions such as Section 53 (Sec. 114, Tit. 28, U. S. C.) dealing with divisions of districts, and Section 59 (Sec. 121, Tit. 28, U. S. C.) dealing with new districts—both of which grant the defendant the right to trial by a jury of his vicinage; and it is confirmed by the traditional regard of Congress for venue in criminal cases and the applicable rule of construction laid down by this Court (*United States* v. *Johnson, supra*). Indeed, if Congress had *itself* undertaken to do so, its action would conflict with the requirement of the Sixth Amendment that a defendant be tried "by an impartial jury of the . . . district wherein the crime shall have been committed, which district shall have been previously ascertained by law."

In sum, taking into consideration all of the differences between the residents of the excluded counties and the included counties, the practice of selecting jurors from only three of the eleven counties in the district resulted in the denial to the defendant of a trial by a fair and impartial jury representing all groups and a cross-section of the district, one of the basic rights of a citizen in a democratic community.

II.

The petitioners were denied a fair trial and their rights under the fifth and sixth amendments, because of the prejudicial misconduct of the foreman of the jury and the trial court's failure to rectify such prejudices.

The fairness and impartiality of the verdict is subject to considerable doubt because of the conduct of the foreman of the jury, Van Voorhis, both before and after his discharge as a juror.

On the *voir dire,* Van Voorhis answered in the negative to the question as to whether he previously served as a juror in criminal cases (254, 5703-8, 5713-9). This answer was false. Van Voorhis had served as a juror in at least seven prior criminal cases. Defense counsel, immediately upon learning of the untruthfulness of Van Voorhis' answer to such an obviously important question, moved that the court immediately excuse him and substitute an alternate (5704-8, 5351, 6323). The court refused to take any action and the trial continued (5726). It was not until after the court had charged the jury, and it was about to leave the courtroom for its deliberations, that Van Voorhis was excused (6784-6843, 6843-6846).

The court, in excusing him at this late date, admitted in effect that Van Voorhis was not qualified to sit as a fair and impartial juror. That being the case, it is submitted that the presence of such a disqualified juror in the jury box, from the time the original objection to him was made until the closing of the trial when he was excused, prejudiced the defendants' right to a fair trial by an impartial jury.

It is true that trial courts admonish juries not to discuss the evidence, and possible guilt or innocence, among themselves from day to day as a trial progresses. But the realities of human nature render it difficult to believe that twelve men will sit in a jury box for eight or nine weeks and never discuss among themselves the trial which absorbs so much of their daily time, and presumably, their interest. If only as a precautionary safeguard, therefore, the foreman should have been removed from the jury when the charges were made. The vacillation of the trial court left a disqualified juror (the foreman) in a positon where he could—and did—talk to, influence, and prejudice members of the jury during the course of the trial.

It should be noted, furthermore, that defendants' counsel had, during the trial, informed the court that the foreman's attitude was hostile to the defendants (5346-5347, 6494-6500). An instance was cited to the court of the foreman's refusing to look at defense exhibits, when the defense counsel passed them to the jury (5347).

The court was also informed that Van Voorhis was discussing the case with other jurors, contrary to admonitions of the court, and proof of this was offered by independent sworn testimony (6494). At a hearing in chambers, a witness testified to hearing the foreman, on March 14, discussing with two other jurors, outside the courthouse, the judge's attitude toward the prosecutor (6495-6500).

Finally, not only was a hostile juror, charged with misconduct, and who had answered falsely on the *voir dire*, allowed to continue to sit with the jury throughout the course of the trial, but *after* he was excused, this same juror entered the jury room while the jury was deliberating (6957). He remained there for five or ten minutes, finally being removed, in an angry mood, and not without some difficulty, by the clerk of the court (6954-7).

On the date set for sentencing, counsel learned for the first time of the discharged juror's unauthorized and prejudicial presence in the jury room, and immediately moved to set aside the verdict and requested an inquiry as to what if any communication Van Voorhis had had with the other jurors in the course of their deliberations (6957). This was refused. Earlier, while the jury was out, counsel had also called the court's attention to a report that Van Voorhis, on the day he was discharged, had publicly stated in the courthouse that he had already lined up seven jurors for conviction (6871, 6956). A request for an inquiry into that charge had also been denied (6872).

There is no more fundamental right that a person charged with a crime can have, than the right to trial by a fair and impartial jury. This elementary right has meaning only where the jury is composed of honest and impartial jurors, free from the taint of prejudice, and where the jury can pass upon the evidence "free from external causes tending to disturb the exercise of deliberate and unbiased judgment. Nor can any ground of suspicion that the administration of justice has been interfered with be tolerated." *Mattox* v. *U. S.*, 146 U. S., 140, 149-50.

Neither of these elements, indispensable to a fair jury trial, were present in the instant case. The foreman of the jury, having served in many prior criminal cases, was ap-

parently so eager to serve on another one, that he was willing to conceal his participation in other trials. Finally, although no longer a juror, and hence a stranger to the cause, he entered the jury room, interrupting its deliberation—all this against a background of hostile and prejudicial conduct and statements by him.

The grounds on which the Court below disposed of this matter hardly seem adequate. As to the false answer, it is said that the Court excused the foreman, which was all the defendants asked. But justice deferred may well be justice denied. As to the later misconduct, it is said that the issue was not properly raised. The motions were made in open court, in the presence of the required witnesses, as had been prior motions addressed to the conduct of this juror. The trial judge left the district immediately thereafter, having denied bail, and defendants were forced to apply to the Court of Appeals for bail. Shortly after the argument on the application, the government itself moved for a remand to inquire into these very matters. This was denied with an opinion (R. p. 2446) which defendants interpreted as calling upon *them* to so move. This they did., in vain (R. pp. 2448-61). It would seem, therefore, that the petitioners, convicted on the basis of presumptions rather than by an impartial jury, should not be pilloried by procedure.

It is the contention of petitioners that the trial court erred in refusing to remove Van Voorhis when the original objection was made; that the trial court erred again in refusing upon request to inquire into Van Voorhis' presence in the jury room; and that Van Voorhis' continued presence in the jury box, although not qualified to sit as a juror, and his subsequent presence as a stranger to the jury's deliberations, combined to deprive the petitioners of their right to a fair and impartial trial by jury.

III.

The trial court erred in admitting the alleged confession of petitioner Stanton which was obtained by coercion and unlawful means.

While a Federal prisoner on an unrelated offense (2271), petitioner Stanton was brought to New York City on a writ of habeas corpus *ad testificandum,* which writ called for his testimony before the grand jury on June 8, 1945, and his return "immediately" to the penitentiary at Danbury, Connecticut (2271, Defendant's Exhibit XX). Despite this, he was kept in New York City for fourteen days after his appearance before the grand jury, and it is uncontroverted that the return in purporting to state that he was "produced in court" on June 11th, 14th, 15th, 16th, 18th and 20th, is false (Defendant's Exhibit XX).

While refusing to answer "on the ground that it might incriminate without counsel, without legal advice" (7068) Stanton was harassed by the Asistant U. S. Attorney through repeated questioning sessions, was told that he could not have counsel, that he had to answer questions put to him in private sessions unless he claimed constitutional grounds (7041-3), and was threatened with "punishment for obstruction of justice" (7039-40). Stanton's counsel was refused access to the office of the United States Attorney while Stanton was there, and was unable to consult with his client (2751-6).

Stanton was improperly instructed by the Assistant U. S. Attorney in the presence of the grand jury; and the grand jury foreman acting on the advice of the prosecutor instructed Stanton that he could not discuss even with his own counsel the matter of his appearance before the grand jury (7093-5, Government's Exhibit 52).

The physical conditions under which Stanton was detained in New York resulted in an impairment of his health (1002, 960, 935-6, 938-44, 2164-6, 2174, 2322-3).

It is submitted that the foregoing facts bring the procedure within the range of judicial condemnation as in: *McNabb* v. *United States,* 318 U. S. 332 (1943); *Anderson* v. *United States,* 318 U. S. 350 (1943). They appear to satisfy even the stringent majority requirements of such cases as *Lyons* v. *Oklahoma,* 322 U. S. 596 and *United States* v. *Bayer,* 331 U. S. 543.

Therefore, taking into consideration the circumstances surrounding petitioner Stanton's allegedly voluntary confession, including the abuse of process by the government in relation to the writ of habeas corpus *ad testificandum,* the denial to defendant Stanton while a prisoner of the right to counsel, and the intimidatory and coercive circumstances of his confinement and questioning by the prosecutor, both privately and before the grand jury, it was error for the trial court to admit the tainted statement thus obtained from Stanton.

Conclusion.

For all of the foregoing reasons, the petitioners respectfully pray that a writ of certiorari issue to review the final judgments of the United States Court of Appeals for the Second Circuit.

Respectfully submitted,

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FILE COPY

February 17, 1948.

C. E. Cropley, Esq.
Clerk, United States Supreme Court
Washington, D. C.

Re: United States *vs.* Gottfried, *et al;*
October Term, Nos. 561-562.

Dear Sir:

Will you kindly call to the attention of the Court the subjoined Additional Argument in Support of Petition, based upon a decision rendered by the Court of Appeals for the District of Columbia on February 2, 1948, after the filing of the above-named petition for certiorari.

Respectfully,

Joseph L. Weiner

Additional Argument in Support of Petition.

Item 7 (p. 7) of the Petition alleges as error the ruling that prosecution for the substantive crime was not barred by the statute of limitations. The opposite result was reached in *Marzani* v. *United States*, decided by the Court of Appeals for the District of Columbia on February 2, 1948 (per Prettyman, J.). The statutes involved and the basis for the decision are set forth in the following excerpts from the opinion:

> "Two statutes are involved. The first is that under which the indictment was laid, which is Section 80, Title 18, of the United States Code, in its present form an act of June 18, 1934,[2] with minor changes by an act of April 4, 1938;[3] Section 35 of the Criminal Code. For ease in discussion, we shall refer to the pertinent clause of its statute as the False Claims Act. That clause provides:
>
> > '. . .; or whoever shall knowingly and wilfully . . . make . . . any false or fraudulent statements or representations, . . . in any matter within the jurisdiction of any department or agency of the United States . . . shall be fined not more than $10,000 or imprisoned not more than ten years, or both.'
>
> "The other statute is Section 590a of Title 18 of the United States Code, which is an act of August 24, 1942,[4] as amended July 1, 1944,[5] and October 3, 1944;[6] Section 19(b) of the Contract Settlement Act of 1944 and

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[2] 48 Stat. 996.
[3] 52 Stat. 197.
[4] 56 Stat. 747.
[5] 58 Stat. 667.
[6] 58 Stat. 781.

Section 38 of the Surplus Property Act of 1944. For ease in discussion we shall refer to this statute as the Suspension Act. In pertinent part it provides;

> 'The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, . . . shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress.'

"The question before us is whether the Suspension Act applies to offenses under the False Claims Act.

"We see no escape from the conclusion impelled by two decisions of the Supreme Court, *United States* v. *Noveck*[7] (and its companion cases, *United States* v. *McElvain*[8] and *United States* v. *Scharton*[9]) and *United States* v. *Gilliland*.[10]

"In *United States* v. *Noveck*, the question was whether a statute which read, 'That in offenses involving the defrauding or attempts to defraud the United States or any agency thereof, whether by conspiracy or not, and in any manner, . . . the period of limitation shall be six years',[11] applied to perjury in an income tax return. The indictment alleged that the perjury was for the 'purpose of defrauding the United States'. The Supreme Court held that the six-year statute did not apply, because defrauding the United States is not an element of the crime of perjury. The language of that statute of limitations is the same

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[7] 271 U. S. 201, 70 L. Ed. 904, 46 S. Ct. 476 (1926)
[8] 272 U. S. 633, 71 L. Ed. 451, 47 S. Ct. 219 (1926)
[9] 285 U. S. 518, 76 L. Ed. 917, 52 S. Ct. 416 (1932)
[10] 312 U. S. 86, 85 L. Ed. 598, 61 S. Ct. 518 (1941)
[11] 42 Stat. 220 (1921)

as that of the Suspension statute here involved; in fact, that statute was the predecessor to this one.

"In *United States* v. *McElvain, supra,* the Court held that the six-year statute of limitations involved in *United States* v. *Noveck* did not apply to a conspiracy to defraud the United States by making a false income tax return. In *United States* v. *Scharton, supra,* the indictment was for an attempt to evade taxes by falsely understating taxable income. The defendant pleaded the statute of limitations. The United States contended that attempts to obstruct or defeat the lawful functions of any department of the Government, if accompanied by dishonest methods, are attempts to defraud the United States. The Court held that the six-year limitation applicable to offenses involving the defrauding of the United States, was not applicable to the offense described in that indictment.[12]

"The United States seems to agree with the foregoing view of the *Noveck* and its allied cases. It says that the Suspension Act 'was modeled upon the proviso' in the 1921 Act; that the 1921 and 1926 provisos 'are in all essential respects indentical with' the present Suspension Act; and that 'said cases were decided in accord with the principle first enunciated in *United States* v. *Noveck,* to wit, that in order to be affected by the suspension statute "defrauding or an attempt to

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[12] Other cases referred to in the briefs in this connection are *Bailey* v. *United States,* 13 F. 2d 325 (C. C. A. 9th, 1926); *Weinhandler* v. *United States,* 20 F. 2d 359 (C. C. A. 2d, 1927), *cert. denied,* 275 U. S. 554, 72 L. Ed. 423, 48 S. Ct. 116 (1927); and *Falter* v. *United States,* 23 F. 2d 420 (C. C. A. 2d, 1928), *cert. denied,* 277 U. S. 590, 72 L. Ed. 1003, 48 S. Ct. 528 (1928). In the *Bailey* case, the court held that defrauding the United States was a statutory ingredient of the offense of uttering and publishing a forged indorsement to a Government check with intent to defraud the United States. In the *Weinhandler* case, the court held that fraud is an element of the crime of embezzlement, and that, therefore, the six-year limitation in the 1921 proviso applied. In the *Falter* case, the court held that a conspiracy to commit a civil fraud is a crime under the conspiracy statute.

defraud" the United States must be an *ingredient* under the statute defining the offense.'

"In *United States* v. *Gilliland, supra,* the question was whether the False Claims Act was restricted to matters in which the Government has some financial or proprietary interest. The Court held that it was not. The conclusion was premised largely on the fact that by amendment in 1934[13] Congress had eliminated from the statute as it had theretofore existed[14] the words 'or for the purpose and with the intent of cheating and swindling or defrauding the Government of the United States,' and that the legislative history of the amending act showed that this omission was deliberate and intentional. Thus, the Court held that defrauding the United States in a pecuniary or financial sense is not a constituent ingredient of offenses under the False Claims Act.

"It necessarily follows, in our view, that the Suspension Act does not apply to offenses under the False Claims Act. The Supreme Court has clearly said (1) that a statute identical in pertinent part with the Suspension Act does not apply to offenses of which defrauding the United States in a pecuniary way is not an essential ingredient; and (2) that such defrauding of the United States is not an essential ingredient of offenses under the False Claims statute. If perjury on an official document required to be filed under a federal statute, the making of false income tax returns and an attempt to evade taxes are not defrauding the United States within the meaning of a statute of limitations, we do not see how making a false statement

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[13] 48 Stat. 996.

[14] 40 Stat. 1015 (1918).

in the course of an inquiry into one's qualifications for federal employment can be." (Footnotes in original.)

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947.

Nos. 561-562.

UNITED STATES OF AMERICA,

v.

HAROLD GOTTFRIED and PURE ROCK MINERAL SPRINGS CORPORATION,

Petitioners.

UNITED STATES OF AMERICA,

v.

HAROLD GOTTFRIED, JOSEPH FORMAN and WILLIAM STANTON,

Petitioners.

REPLY BRIEF FOR PETITIONERS.

Certain errors and misconceptions in the Government's brief prompt the following comments.

1. The statute of limitations issue is not, as the Government contends, limited to defendant Gottfried. Defendant Pure Rock is also affected by it since it was included only in the substantive indictment and not, as erroneously stated by the Government (Brief, p. 27), in the conspiracy indictment.

The suggestion that the writ be limited to this issue is disingenuous. If the prosecution on the substantive indictment was barred, the fairness of the trial must be reconsidered on that ground alone. This was recognized in the *Marzani* case, although the court concluded that the trial was, in fact, fair. That conclusion was reached with respect to the following circumstances: Marzani was indicted on eleven counts for substantially identical statements, made to secure or retain government service between 1942 and 1946. The statements were answers to questions whether Marzani had ever been a member of the Communist Party, and the like. The falsity was established by his activities in 1940 and 1941. There was, therefore, only a single issue, and the only additional proof required for the earlier counts was the fact that the statements were made—apparently not denied. Here, on the other hand, the indictments concerned different kinds of offenses, involved different defendants with a single exception, and perhaps half of the trial was devoted to the substantive indictment. Consolidation of the indictments for trial was granted over defendants' objections (R., p. 81), and is one of the actions sought to be reviewed (Petition, p. 6, item (4)). The propriety of this action becomes all the more questionable if the substantive indictment should not have been brought to trial. We submit further that the other issues would justify review even if the statute of limitations issue were absent.

2. With respect to the method of selection of jurors in the Southern District of New York, the Government has chosen to disregard the substantive problems of fairness, and limits its discussion to the single issue of whether an order to that effect can be inferred. Even on this narrow issue, the Government fails to mention the *May* case (Peti-

tion, p. 11), nor its earlier contention that *May* has been overruled by *Lewis,* despite the special facts and narrow limits of the latter.

If, as the Government contends, the clerk of the District Court, with the tacit acquiescence of the Judges of that Court, has effected a "division of the district" (Brief, p. 8), we submit that the clerk has usurped the function of the Congress, that the latter has never delegated such authority even to the court itself, that it has never exercised its own authority in this manner, and that its power to do so is questionable under the Sixth and Fourteenth Amendments. Certainly this Court has never ruled otherwise, and the contrary decision of the court below on such a fundamental issue should be reviewed.

3. With respect to the misconduct of the foreman of the jury, the Government has, we believe, fallen into error by failing to distinguish between the various acts of misconduct. That Van Voorhis, when he was improperly in the jury room, discussed the case with the other jurors, was a matter of surmise and counsel so stated in requesting an investigation.* That Van Voorhis *was* improperly in the jury room and that the clerk had to call him out was asserted as a fact in the presence of the clerk (R., p. 2319). That Van Voorhis had served on criminal juries not only in 1935, as discovered by accident, but also twice in 1944, twice in 1942, and earlier, was asserted by defense counsel as a fact (R., pp. 1901-3), after they had examined the records of the court pursuant to court direction (R., p. 1784).

The inference that defense counsel were content with the court's dilatory treatment of their motion is unwar-

* Of course, counsel could not approach the jurors, who had been admonished not to disclose what transpired.

ranted. The Assistant United States Attorney had confirmed that Van Voorhis had served in 1935 (R., p. 1781) but failed to supply his complete record, which he had promised (R., p. 1732). The court asked defense counsel to obtain the entire record (R., p. 1784). He also asked for legal memoranda (R., p. 1909). Should defense counsel have refused to comply? Could they have done so more rapidly in view of their preoccupation with the actual trial?

4. The Government's statement of the circumstances of the alleged "confession" proves too much. It seeks to eliminate the exercise of coercion, whereas the court below went no further than to hold that the effect of coercion had ceased (R., p. 2471). We did not attempt to do more than summarize the kinds of coercion which occurred.* Instances of continuing coercion, such as the following, cannot of course be disputed:

> "Mr. Bender:** Mr. Foreman, will you direct, on behalf of the Grand Jury, will you direct this witness that he shall maintain the oath of secrecy of the Grand Jury; . . .
>
> "The Foreman: I call your attention, Mr. Stanton, to the fact that all proceedings in the Grand Jury room are strictly secret. They are not to be discussed by you with anyone . . .
>
> "The Witness: May I ask a question?
>
> "The Foreman: Certainly.
>
> "The Witness: I'm not allowed legal counsel at all?
>
> "The Foreman: You are not allowed to discuss with your counsel what transpired in this room" (R., p. 2365).

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* Even the opinion below is not free from inaccuracies. For example, it states (R., p. 2469) that Stanton "signed a written confession," whereas Stanton neither signed nor saw the trascript (R., p. 780).

** Assistant United States Attorney.

It therefore remains the responsibility of this Court, "regardless of the contrary conclusions of the triers of facts," to determine from the "conceded facts" whether Stanton had "mental freedom to confess or deny." *Lyons* v. *Oklahoma*, 322 U. S. 596, 602 (1944).

Dated New York, March 10, 1948.

Respectfully submitted,

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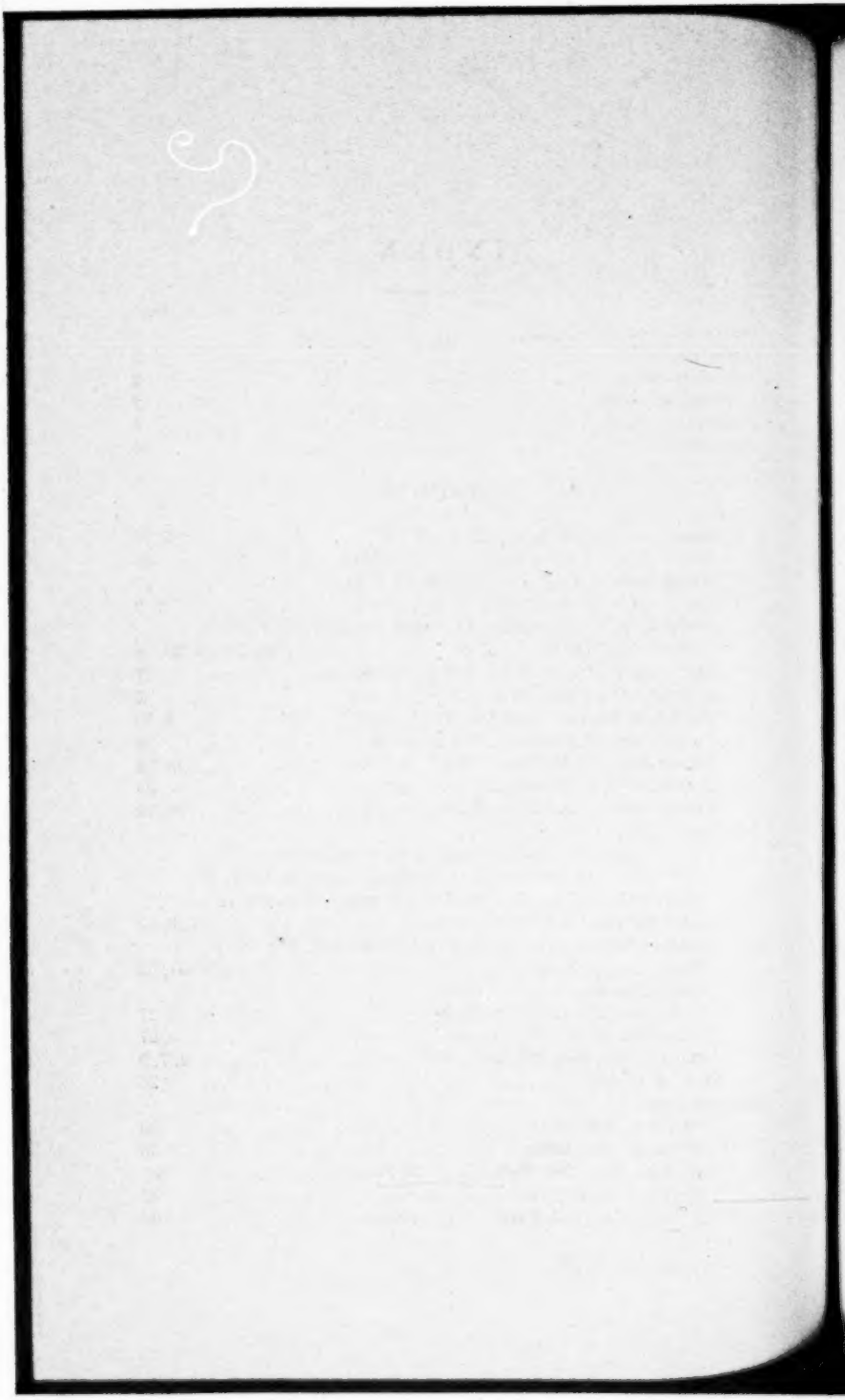

In the Supreme Court of the United States

OCTOBER TERM, 1947

No. 561

HAROLD GOTTFRIED AND PURE ROCK MINERAL SPRINGS CORPORATION, PETITIONERS

v.

UNITED STATES OF AMERICA

No. 562

HAROLD GOTTFRIED, JOSEPH FORMAN AND WILLIAM STANTON, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the circuit court of appeals (R. 2462–2474) has not yet been reported.

JURISDICTION

The judgments of the circuit court of appeals were entered January 2, 1948 (R. 2474–2475). The petition for writs of certiorari was filed January 30, 1948. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rules 37 (b) (2) and 45 (a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the grand and petit jurors were summoned in conformity with Section 277 of the Judicial Code.

2. Whether petitioners were denied a fair trial because of the alleged misconduct of a juror who was excused before the case was submitted to the jury.

3. Whether the trial judge erred in finding that petitioner Stanton's statement of June 16, 1945, was voluntarily made.

4. Whether a prosecution under the False Claims Statute is for defrauding the United States within the meaning of 18 U. S. C. 590a.

STATUTES INVOLVED

Section 277 of the Judicial Code (28 U. S. C. 413) provides:

> Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden

the citizens of any part of the district with such service.

Section 37 of the Criminal Code (18 U. S. C. 88) provides:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object to the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

Section 35A of the Criminal Code (18 U. S. C. 80) provides:

> Whoever shall make or cause to be made or present or cause to be presented, for payment or approval, to or by any person or officer in the civil, military, or naval service of the United States, or any department thereof, or any corporation in which the United States of America is a stockholder, any claim upon or against the Government of the United States, or any department or officer thereof, or any corporation in which the United States of America is a stockholder, knowing such claim to be false, fictitious, or fraudulent; or whoever shall knowingly and willfully falsify or conceal or cover up by any trick, scheme, or device a material fact, *or make or cause to be made any false or fraudulent statements or representations,* or make or use or cause to be made or used any false bill, receipt,

> voucher, roll, account, claim, certificate, affidavit, or deposition, knowing the same to contain any fraudulent or fictitious statement or entry in any matter within the jurisdiction of any department or agency of the United States or of any corporation in which the United States of America is a stockholder, shall be fined not more than $10,000 or imprisoned not more than ten years, or both. [Italics added.]

STATEMENT

On January 28, 1946, petitioners Gottfried and Pure Rock Mineral Springs Corporation were indicted in the United States District Court for the Southern District of New York in two counts charging that they made false and fraudulent statements to the Office of Price Administration in obtaining sugar rations, in violation of Section 35A of the Criminal Code (R. 13–22).[1] An additional indictment returned January 28, 1946, charged that Gottfried and petitioners Forman and Stanton conspired, in violation of Section 37 of the Criminal Code, to defraud the United States of the fair and honest services of Stanton, who was an investigator of the Office of Price Administration, and that the conspiracy contemplated bribing Stanton not to report violations which were committed by Gottfried and Pure Rock Mineral Springs Corporation (R. 23–28).

[1] It appears that as a result of the false statements, these petitioners obtained an allotment of approximately one million pounds of sugar in excess of their allowable quota (R. 2302).

The indictments were consolidated for trial, and after a protracted jury trial the petitioners were convicted (R. 2286). The corporation was sentenced generally to pay a fine of $10,000 (R. 2428). Petitioner Gottfried was sentenced to imprisonment for three years on each count of the substantive indictment and for one year on the conspiracy charge, the sentences to be served concurrently, and to pay fines totaling $20,000 (R. 2429–2432; but see R. 2309–2310). Petitioner Forman was sentenced to imprisonment for a term of one year and a day and to pay a fine of $5,000 (R. 2433–2434). Petitioner Stanton was sentenced to a term of one year and a day (R. 2435). Upon appeal to the Circuit Court of Appeals for the Second Circuit, the judgments of conviction were affirmed (R. 2474-2475).

Petitioners do not argue the sufficiency of the evidence to support their convictions. The evidence in this respect is summarized in the opinion of the court below (R. 2463–2464). The evidence pertinent to the questions of law which petitioners present is summarized in the Argument in connection with the discussion of each question.

ARGUMENT

1. Relying on *Ballard* v. *United States,* 329 U. S. 187, and *Thiel* v. *Southern Pacific Co.,* 328 U. S. 217, petitioners challenge (Pet. 7–13) their convictions on the ground that the jurors for the grand and petit juries were not summoned from all of the counties included in the Southern District of New York.

The contention was first raised by motion to dismiss the indictment prior to trial (R. 29–31). Opposing affidavits were filed (R. 33–49), testimony was taken at a hearing (R. 51–66, 67–77), and the motion was subsequently denied (R. 78). The factual picture is reflected in the affidavit of the clerk of the District Court, in which the practice in the Southern District is summarized as follows (R. 42–43):

> The vast majority of jurors are drawn from New York and Bronx Counties and nearby Westchester County. This is done, not for the purpose of excluding residents of other more remote counties, but for practical reasons. Jurors summoned from more remote counties have complained in the past, I am informed, that it was impracticable for them to return home at the end of each court day and that in consequence they incurred the expense of living in New York City, for which they received no reimbursement beyond the statutory four dollar fee paid to all jurors. Moreover their businesses suffered because of their protracted absence. In addition the Government was put to the expense in the case of such jurors of paying their transportation to and from their homes at the end of each week of the term of their jury duty. In view of these facts and further in view of the fact that the applicable statute, Title 28 (Judicial Code) Section 413, U. S. C. requires that jurors shall be returned "so as not to incur an

> unnecessary expense," the practice in this district, for the past few years has been to draw jurors principally from the counties near the Court. However, jurors from more remote districts who indicate their willingness to serve and who meet the statutory qualifications are never excluded but are included in the file of qualified and available jurors. * * *

Petitioners assert that this practice invades their constitutional rights, but it is plain that there is no constitutional problem presented. For the Sixth Amendment entitles a defendant to trial by a jury from the state and district where the offense was committed, and the petitioners were indicted and tried by juries composed of persons from that district. The Amendment does not require that the jurors shall have been summoned from the entire district. *Lewis* v. *United States,* 279 U. S. 63, 72; *Ruthenberg* v. *United States,* 245 U. S. 480, 482.

The question, rather, is whether the practice in the Southern District of New York complies with the statutory requirements which have been imposed. The controlling provision is Section 277 of the Judicial Code (28 U. S. C. 413), which provides:

> Jurors shall be returned from such parts of the district, from time to time, as the court shall direct, so as to be most favorable to an impartial trial, and so as not to incur an unnecessary expense, or unduly burden

> the citizens of any part of the district with such service.

That the practice in the Southern District satisfies the statutory command is demonstrated quite plainly by Judge Learned Hand's discussion of the problem in his opinion for the court below. The opinion demonstrates that the practice did not deny petitioners an impartial trial (R. 2465–2466) and it is not disputed that it avoids unnecessary expense and the imposition of an undue burden on citizens of the more distant parts of the district who would be separated from their homes and families for the duration of their jury service (except on week-ends) and who would be out of pocket financially.

The argument that there never was an order entered which authorized division of the district is answered by Judge Hand, relying on his knowledge of the practice in the court, as follows (R. 2467):

> The argument proceeds, however, that there was never any order entered in the district which authorized its division, and that in *May* v. *United States* [199 Fed. 53, 59 (C. C. A. 8)] the court, although it recognized the validity of the statute, declared that without such an order the presumption was that the court believed an array drafted from the whole district would be "most favorable to an impartial trial." That may well be true in cases where the court has never either by express order, or

by long recognized practice, in effect divided the district; but in the Southern District of New York, although no express order has been found, it appeared from the testimony of the clerk and his deputy,[2] that for at least ten years before the trial it has been the unbroken practice not to draft jurors from counties north of Westchester, although residents of those counties have in a few cases been accepted, when they volunteered. A practice of such long standing must have been known to the judges of the district and have been approved by them. It is true that Judge Hand and I, who served as district judges in that district, each for more than twelve years, cannot now be sure, after a lapse of over twenty years, that our memories are reliable; yet we believe that the practice existed also in our time which in my own case goes back to 1909.

In its essential aspects, petitioners' argument is the same as that which this Court considered in *Lewis* v. *United States,* 279 U. S. 63, where jurors were not summoned from ten counties in the district. The question there was whether the requirements of Section 277 of the Judicial Code had not been met because there was no evidence of a formal written order directing the clerk not to summon jurors from the entire district. Approval of the practice was inferred from the surrounding circumstances. Similarly here, ad-

[2] See R. 52–54, 57–61.

herence to the practice of summoning prospective jurors from the nearby counties rests on the authority of long recognized practice, dating back, it appears, at least to 1909. The denial of petitioners' motions to dismiss the indictment on this ground and the selection thereafter of a petit jury from a panel summoned in accordance with the usual practice, amply illustrates the district court's approval of the practice.

The decisions in *Ballard* v. *United States*, 329 U. S. 187, 191, and *Thiel* v. *Southern Pacific Co.*, 328 U. S. 217, 221, recognize the validity of Section 277 of the Judicial Code, and since the practice in the Southern District of New York complies with that provision, there is no comfort for petitioners in those decisions.

2. Petitioners' second contention (Pet. 13–16) is that they were denied a fair trial because of the alleged misconduct of a juror who was excused before the case was submitted to the jury. The fundamental difficulty with the argument is that it does not take cognizance of all the pertinent facts. When the full factual picture is analyzed, it is plain that there is no substance in the contention.

(a) The facts relating to the events prior to the discharge of juror No. 1, Mr. Van Voorhis, may be summarized as follows:

The trial commenced on February 4, 1947, and was concluded on March 26, 1947. On Friday,

March 14, one of the defense counsel suggested to the court that Van Voorhis had failed to disclose to the court when examined on the *voir dire* that he had previously served on a jury in a criminal trial (R. 1730–1732). The court directed counsel to ascertain whether this was true (R. 1732). On the following Monday, March 17, the Assistant United States Attorney informed the court that he had learned that Van Voorhis served as an alternate juror in a trial in 1935 (R. 1781). Petitioners' counsel stated that from their inquiries they believed that Van Voorhis had indicated some hostility in this case by not looking at one of the defense witnesses while he testified and by saying "Huh" to defense counsel when certain exhibits were handed to him (R. 1781–1782). Counsel also informed the court that after the jurors left the courtroom on the previous trial day, Van Voorhis remarked to another juror, that the trial judge was very unfair to the Assistant United States Attorney who was prosecuting the case (R. 1782–1783).[3] The court suggested to counsel that if they desired to urge these matters as a basis for a motion requesting that Van Voorhis be excused and that an alternate juror take his place, they should offer proof to support their motion. Counsel were instructed by the court, "Find out what

[3] A witness later testified that Van Voorhis had said, "I believe, I think that the judge is being unfair with the boy" (R. 2167).

you can as to the facts and then I will hear you." (R. 1784–1785.)

Two days later, on March 19, defense counsel informed the court that they had learned that Van Voorhis had several times served as a juror in criminal cases (R. 1901–1903). The Assistant United States Attorney suggested to the court that he was doubtful that Van Voorhis had been asked whether he had previously served as a juror in a criminal case (R. 1905),[4] and that if the question had been asked, it was possible that Van Voorhis' failure to disclose his prior jury service might have been due to an innocent misapprehension (R. 1906, 1908). The court instructed counsel to search for decided cases which would serve as authorities for their respective positions (R. 1909). In a colloquy later the same day, the court reiterated that it was the defendants' burden to offer formal proof to support their motion (R. 1940).

At the close of all the evidence on March 21, the question as to the alleged misconduct of Van Voorhis was again brought up. At the outset, the court stated (R. 2108):

> Now, about this juror matter: I want to get this matter submitted to me in some proper way where I can get at the facts and do what I think is the right thing under all circumstances. I realize it is a

[4] The examination on the *voir dire* was not stenographically transcribed (R. 1905).

> matter of importance to this juror, and I do not want to remove him and put another person in his place unless I think that justice requires it to be done. At the same time, I want to be fair with the defendants, and if I think that justice requires that he be replaced, I want to do that. * * *

And, again, the court invited defense counsel to submit formal proof as to the facts by affidavit or otherwise (R. 2110, 2113).

On March 26, when counsel had completed their summations, the court again adverted to the Van Voorhis matter and after having been assured that defense counsel did not intend to challenge any of the other jurors, the court announced that Van Voorhis would be excused as a juror at the conclusion of the charge (R. 2255). The court stated that this action was being taken in view of the various charges asserted by petitioners against Van Voorhis and solely because an alternate juror was available and there thus could be no harm in discharging Van Voorhis (R. 2256–2257). The court later talked with Van Voorhis concerning the matter asserted against him and at the conclusion of the trial, the court stated (R. 2293) to the jurors:

> Ladies and gentlemen, I want to clarify this in your minds. If you inferred, from anything I said, that there was an intentional and deliberate misrepresentation of facts by Mr. Van Voorhis, I want to correct that now. The information that I

> have about the matter—and I have investigated it and I have talked with counsel about it—and I say this in justice to Mr. Van Voorhis—I am convinced that there was no intentional or deliberate withholding of information by Mr. Van Voorhis. I think it was a case of misunderstanding of the questions asked, and I am making this further explanation in justice to Mr. Van Voorhis.

It is on the basis of these facts that petitioners urge (Pet. 13–14) that the court committed prejudicial error in not discharging Van Voorhis on March 14, when they first raised the question, rather than at the close of the charge to the jury. It is said (Pet. 16) that "justice deferred may well be justice denied." It may be noted that petitioners never did prove what they asserted. The court ultimately discharged Van Voorhis solely out of an abundance of caution and because there was an alternate juror available.

Even assuming that Van Voorhis should properly have been discharged, there was no unnecessary delay in doing so. The time between March 14, when the motion was first made, and March 26, when it was granted, was consumed by petitioners in seeking out the facts and the pertinent principles of law. Time and again the court told petitioners that if they wanted to press the motion, it was their responsibility to offer formal proof in support of it. That petitioners were well satisfied with the procedure

adopted by the trial judge is plain from the fact that not once during the 12-day interval when the matter was being discussed by counsel and the court did counsel object to the court's action. It is plain, too, that if they had objected, the court would have been justified in denying their motion for lack of supporting proof. For all that petitioners offered the court in respect of the question whether Van Voorhis had failed to disclose prior jury service was the unsupported statements of counsel.

If petitioners believed that the presence of Van Voorhis on the jury was against their best interests they could have protected themselves by speedily adducing the facts in court by competent proof. They were given adequate opportunity to do so. They failed to avail themselves of it.

(b) The second aspect of petitioners' contention involves an assertion—but not proof—that Van Voorhis may have communicated with other jurors after he was removed from the jury. Here, too, the facts need a fuller statement than petitioners have given them.

After sentence had been imposed on petitioners, one of the defense counsel stated to the court that he had learned that after Van Voorhis had been dismissed from the jury and before the jury commenced its deliberations, he went into the jury room and remained there for five or ten

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minutes. It was suggested by counsel that Van Voorhis "might have talked to some of the other jurors and expressed an opinion." (R. 2318–2319.) Counsel candidly stated to the court, "I am surmising, as your Honor knows" (R. 2319).[5] The court informed counsel that in its view "that is [not] the proper way of raising this matter" and that if counsel desired to, he could subsequently properly present the question (R. 2319).

Petitioners did not thereafter file any motion in the trial court seeking to present the question which they had raised. After the appeal was taken, the Government filed a motion in the circuit court of appeals requesting that the case be remanded for the purpose of determining whether there were any improper communications between Van Voorhis and the jury (R. 2443–2445). The motion was grounded on the "Government's interest in a verdict free from any suspicion whatsoever of improper conduct on the part of the jury" (R. 2445). This motion was denied (R. 2446), and petitioners thereafter filed a similar motion in the circuit court of appeals (R. 2451–2456). The Government, having conducted its own investigation in the meantime, opposed the motion on the ground, *inter alia,* that "the moving papers are utterly devoid of any evidence to warrant the inquiry asked for" (R.

[5] Counsel also asserted that Van Voorhis had said that he did not care whether he would be excused; that he had seven others lined up with him for conviction (R. 2319).

2458). The supporting affidavit of the Assistant United States Attorney stated (R. 2460):

> I believe from my conversations with Van Voorhis, Alternate Juror No. 2, the Clerk of the part, and the bailiff in charge of the jury (which conversations resulted in my obtaining affidavits showing that there were no communications whatsoever with respect to this case among Van Voorhis and the other members of the jury after he had been excused from the jury), that the defendants had spoken to the Clerk of the part and the bailiff in charge of the jury on the day following the rendition of the verdict in an attempt apparently to verify the statements which counsel had made to the Trial Judge on the motion to set aside the verdict. In the light of this, the fact that no affidavits were ever submitted and are not submitted now by the defendants to substantiate the allegations which counsel made on the motion to set aside the verdict and which counsel is repeating now in the affidavit attached to the instant motion papers, shows conclusively that the inquiry is merely a "fishing expedition." * * *

Petitioners' motion was thereafter denied (R. 2461).

Quite plainly, the trial judge properly declined to act on the basis of the "surmise" of one of the defense counsel that there may have been improper communication between Van Voorhis and

the jury when Van Voorhis went to the jury room after he was excused, apparently to obtain his belongings. If petitioners desired to raise the question, it was their responsibility, as the trial judge indicated, to present a motion supported by evidence, not surmise. The developments in the proceedings before the circuit court of appeals demonstrate that they had no evidence to support their motion. For the affidavit of the Assistant United States Attorney squarely presented the factual picture and petitioners made no effort to controvert it. In the circumstances, the circuit court of appeals would not have been justified in remanding the case. Both courts properly declined to act until petitioners came forward with proof to support their position. In neither court did petitioners do so.

3. On June 16, 1945, petitioner Stanton gave a statement (R. 1117–1143) to Assistant United States Attorney Bender, which detailed the facts involved in the offense for which he was convicted. This statement was received in evidence at the trial only against Stanton (R. 1116–1117, 1143–1144). Prior to its admission in evidence, the trial court conducted a lengthy preliminary inquiry into Stanton's claim that the statement was not a voluntary one, and the court found that the statement was voluntary (R. 1112–1113, 1091–1092). Evidence bearing on the question whether the statement was voluntarily given was taken before the jury, and they were instructed that the statement

could be considered against Stanton only if they found that it was voluntarily made (R. 2276–2278). The circuit court of appeals found that the evidence relied upon by petitioners as showing that his statement was coerced "is not very convincing in print, and apparently it was not when given in court" (R. 2470), and the contention that the trial judge erred in admitting the statement in evidence was squarely rejected (R. 2470–2471).

Notwithstanding that two courts, and presumably the jury, have found that the statement was voluntarily given, petitioners persist in their contention in this Court. Without stating the evidence which the courts below relied upon in making their findings on the question, petitioners have selected fragments from the entire factual picture, and on the basis of these they argue that it was error for the trial court to admit Stanton's statement in evidence (Pet. 17–18). The opinion of the court below as well as the ruling of the trial judge on the question demonstrate quite plainly, we believe, that the contention is totally without merit.

Since petitioners have not stated the pertinent facts, we shall briefly summarize the evidence which supports the findings of the courts below:

In June 1945, petitioner Stanton was serving a term of imprisonment at the federal prison at Danbury, Connecticut, on his conviction for the unlawful sale of gasoline ration coupons (R. 757–758). On June 6, 1945, Stanton was brought to

New York on a writ of habeas corpus *ad testificandum* and he was confined in the Federal House of Detention in New York City until June 22, when he was returned to Danbury (R. 752). On June 7, less than twenty-four hours after his arrival in New York, Stanton conferred with Mr. Martocci, his lawyer, at the place where he was temporarily confined (R. 755). On June 8, he was taken to the office of Assistant United States Attorney Bender, where he was interrogated concerning the offense involved here (R. 998). At this conference, Stanton was told that the "purpose of bringing you down here is to ask you certain questions and to get from you certain answers or in the event that you wish to exercise your privilege, the statement from you that you refuse to answer a question on the ground that it tends to incriminate you or subject you to a penalty" (R. 2346). Stanton was carefully advised of his constitutional rights and he stated that he also had been advised concerning them by a prison official at Danbury (R. 2347-2348). He answered some questions (R. 2348–2354), but he declined to answer apparently incriminating questions until he had consulted his attorney (R. 2354–2356). Thereupon, he was taken before the grand jury and substantially the same events reoccurred (R. 2357–2365).

Petitioner Stanton was questioned again by an Assistant United States Attorney on June 11, and he evidently again refused to make a state-

ment (R. 928–929). On either June 11 or 13 he indicated to the Assistant United States Attorney that he would like to see his wife who lived in Kingston, New York, to ascertain from her whether petitioner Forman had been financially supporting her while Stanton was in prison (R. 929–930, 987–988). Mrs. Stanton was brought to New York on June 14 and she conferred privately with Stanton for approximately forty-five minutes at the place where he was confined (R. 930–931). At the conclusion of the conference, Stanton asked to be taken to the office of Assistant United States Attorney Bender (R. 931). Mrs. Stanton told Bender that she believed that her husband was prepared to make a statement (R. 940), and Stanton requested that he be given a day or two to collect his thoughts before making the statement (R. 940). Bender was agreeable to Stanton's request, and after a further talk with his wife, Stanton was returned to detention headquarters (R. 940–941).

On June 16, Stanton was taken to Assistant United States Attorney Bender's office and in the presence of two investigators he answered questions put to him by Bender (R. 710, 713, 714, 716, 1071). The taking of the statement lasted for approximately two hours (R. 750–751). There were no off the record discussions in the course of the interrogation (R. 709, 711, 717, 1077); and there were no threats or promises made to Stanton (R. 947, 950, 985, 986, 1076, 1077, 1079, 1080).

The text of the statement discloses that Stanton was fully advised again as to his constitutional rights (R. 1117–1118); that he stated that no threats or promises were made to him and that he had changed his mind about giving a statement for his "own personal reasons" (R. 1118, 1143).

Some seven months later, on January 10, 1946, Stanton, accompanied by counsel who remained outside (R. 875), appeared before the grand jury which returned the indictments involved in these cases (R. 874, 943, 1089). In January 1947, on the day that his parole term expired, petitioner Stanton surrendered himself to the sheriff of Ulster County, where he lived, and told him that "I would like to go down to New York and tell my entire story" (R. 1066–1067). Stanton indicated to the sheriff that he believed that neither his attorney nor petitioner Forman were interested in his welfare and offered to tell his story to him, but the sheriff declined either to hear the full story or to take petitioner into custody (R. 1067–1068). Instead, he notified an agent of the F. B. I. (R. 1073).

Stanton then proceeded to New York City on his own initiative and contacted the office of Assistant United States Attorney Bender. At Stanton's request, an investigator met him at his hotel (R. 943). Stanton told McIntyre, the investigator, that his wife had urged him to tell the "whole story", and that petitioner Forman

had not been of aid to him in securing a job, and that he wanted to make full disclosure to Assistant United States Attorney Block, who was then in charge of the case (R. 944). Stanton gave additional information to Block and discussed the possibility that he might plead guilty to the indictment which was then pending (R. 945, 946).

This evidence, we submit, fully supports the conclusion of the trial judge that the June 16, 1945, statement was voluntarily made. The trial judge stated his reasons for so holding, as follows (R. 1112–1113):

> * * * I reached this conclusion after hearing the evidence and observing the demeanor of the various witnesses. The statement of June 16th was not obtained by duress. If any duress or coercion was used between June 6th and June 14th, which I do not find to have existed, there was sufficient time elapsing between June 14th and June 16th to dispel any continuing effect of such duress, as was the case in *Lyons* v. *Oklahoma,* 322 U. S. 602. There an involuntary confession was [separated] from a subsequent voluntary confession by a period of 12 hours.
>
> * * * * * *
>
> Here the evidence shows that prior to June 14th Stanton did not want to make a statement; that he indicated that if he could talk to his wife he might make a statement; that he was held in New York while officers went to Kingston and re-

> turned with his wife; that after talking to his wife he was given ample time to think the matter over and then voluntarily decide whether he wanted to make a statement. And the evidence shows that he changed his mind about that matter of making a statement, and the evidence shows why he changed his mind after talking to his wife. The statement itself shows that Stanton not only answered questions propounded to him but volunteered much that was not asked. And much of what was volunteered bears on why he changed his mind after talking to his wife.

None of the considerations advanced by petitioners (Pet. 17–18)* detract from the plain fact that Stanton did not confess until he had satisfied himself that petitioner Forman had not helped to support his family while he was in prison (see R. 994). Prior to that time, Stanton had flatly refused to give incriminating information, either to the grand jury or the Assistant United States Attorney. His change in attitude was occasioned,

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* There was ample evidence in the trial court which refutes petitioners' assertion that Stanton's health was undermined while he was confined in New York (R. 326, 878, 935; see R. 755). Similarly, the claim that his counsel was denied access to the Assistant United States Attorney's office while Stanton was there is answered by the undisputed fact that Stanton knew that his counsel was in an anteroom to the office (on another matter (R. 728)), and that he not only did not request his counsel's presence, but also that he strongly urged that his counsel not be brought in (R. 1015, 1078; see, also, R. 996, 1015).

as he said, "for my own personal reasons" (R. 1118, 1143), and his later unsolicited confession in January 1947, after he had been indicted, confirms the fact that he and Forman had had a falling out, and that Stanton was determined to implicate those who were parties to the offense. As both courts below found, the picture is not one of a brow-beaten prisoner who confessed rather than be subjected to coercive measures; it is one, as often happens, of an underling in a criminal venture who for personal reasons determined that he would implicate his partners in crime. We fully agree with the conclusions of both courts below on this question.

4. Two indictments are involved in this litigation. The conspiracy indictment in No. 562 was returned in January 1946, less than three years after the occurrence of the overt acts alleged and proved. The indictment in No. 561, which charged Gottfried and the corporation with filing false and fraudulent statements with the Office of Price Administration, alleged that the offenses occurred on or about April 29, 1942, and was returned January 28, 1946, approximately three years and nine months after the offenses occurred. Petitioners contended in the court below that the latter indictment was barred by the statute of limitations,[7] but the court rejected the argument

[7] The ordinary period of limitations for offenses such as this one is three years, as provided in 18 U. S. C. 582.

(R. 2473) on the ground that the offenses involved fraud on the United States and the statute of limitations was therefore extended by 18 U. S. C. 590a.[8]

In this Court petitioners reassert the contention and urge that the holding of the court below on this question is in conflict with the decision of the United States Court of Appeals for the District of Columbia in *Marzani* v. *United States*, No. 9595, decided February 2, 1948, where the court said that the suspension act did not extend

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[8] This statute, which is the Act of August 24, 1942, 56 Stat. 747, as amended by Section 19 (b) of the Contract Settlement Act of 1944, 58 Stat. 667, and Section 28 of the Surplus Property Act, 58 Stat. 781, provides:

"The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present war, or with any disposition of termination inventory by any war contractor or Government agency, or (3) committed in connection with the care and handling and disposal of property under the Surplus Property Act of 1944, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law."

the statute of limitations in respect of the making of false and fraudulent statements in violation of the False Claims Statute (Section 35A of the Criminal Code, 18 U. S. C. 80) except in cases where the fraud results in a financial or property loss to the Government.

Concededly, there is a conflict in principle between the two decisions. We think it clear, however, that the language of the *Marzani* opinion upon which petitioners rely is a dictum, for the judgment of conviction was affirmed, and the court, if it were so inclined, could have disposed of the case without ever reaching the question. The court held that two of the counts involved in that case were within the three-year limitation period, and that either count supported the general sentence which was imposed.

It should be noted, too, that the issue affects only petitioners Gottfried and the corporation. They are the only defendants named in the substantive indictment. The conspiracy indictment was returned less than three years after the overt acts occurred (see R. 23-27).

Thus, although all of the petitioners make the limitations contention, only petitioners Gottfried and the corporation are affected by the question and, we submit, only they are entitled to urge it in this Court.

The *Marzani* dictum was predicated on three decisions of this Court, none of which, we believe, compels the result which the Court of Appeals for the District of Columbia reached. In all three cases, this Court was concerned with the question whether the prosecution was for defrauding the United States and was therefore not barred by the three-year limitation period. In *United States* v. *Noveck,* 271 U. S. 201, this Court held that a prosecution for perjury was not a prosecution for defrauding the United States because defrauding the United States is not an ingredient of the offense of perjury. *United States* v. *McElvain,* 272 U. S. 633, involved a conspiracy to defraud arising out of the making of a false tax return, and this Court held that none of the substantive tax offenses for which the defendant could have been indicted were included in a proviso to the statute of limitations extending the limitation period, and that a conspiracy to commit any of these offenses likewise was not included. In *United States* v. *Scharton,* 285 U. S. 518, a prosecution for attempting to evade taxes by falsely stating taxable income, the Court held that the longer period of limitations was not

applicable because the specific offense charged did not include fraud as one of its ingredients. This Court has never held that a prosecution for filing a false and fraudulent statement with a Government agency, in violation of the False Claims Statute, is not an offense which involves the defrauding of the United States within the meaning of the limitation statute.[10] Indeed, in *United States* v. *Gilliland*, 312 U. S. 86, 93, the Court specifically recognized that a broad concept of fraud is an ingredient of the offense for which Gottfried and the corporation were convicted, and the Court said that it is not restricted to cases involving pecuniary or property loss to the Government.[11] Nothing in this Court's decisions, which seemed controlling to the court in the *Marzani* case, even suggests that where fraud is a specific ingredient of the offense, there also

[10] Compare *Braverman* v. *United States*, 317 U. S. 49, 54–55, where this Court recognized that Congress amended the limitations provisions applicable to criminal tax prosecutions to overcome the results in the *McElvain* and *Scharton* decisions. In these circumstances the *McElvain* and *Scharton* decisions, which the *Marzani* opinion regards as controlling, are quite clearly of dubious significance in showing the congressional purpose in respect of this kind of legislation. That these decisions do not reflect the purpose of Congress in enacting the present statute is borne out by the convincing legislative history which is set forth, *infra*, pp. 30–31.

[11] The indictment here alleges that Gottfried and the corporation "did make and cause to be made, false and fraudulent statements and representations" in a matter before the Office of Price Administration (R. 13; see also R. 18).

must be a showing of a property or financial loss to the Government before the longer limitation period applies.

Even a deeper vice affects the dictum of the *Marzani* opinion. The legislative history of the suspension act—to which no reference is made in the *Marzani* opinion—persuasively demonstrates that the False Claims Statute was brought to the attention of Congress, and that there was a specific congressional intent to extend the period of limitations for violations of that statute, without limitation as to the nature of the fraud.

Thus, the Contract Settlement Act of 1944, provided in Section 19, the enforcement provision, as follows:

* * * * *

> (b) The first section of the Act of August 24, 1942 (56 Stat. 747; title 18, U. S. C., Supp. II, sec. 590a), is amended to read as follows:
>
> The running of any existing statute of limitations applicable to any offense against the laws of the United States (1) involving defrauding or attempts to defraud the United States or any agency thereof whether by conspiracy or not, and in any manner, or (2) committed in connection with the negotiation, procurement, award, performance, payment for, interim financing, cancelation or other termination or settlement, of any contract, subcontract, or purchase order which is connected with or related to the prosecution of the present

war, or with any disposition of termination inventory by any war contractor or Government agency, shall be suspended until three years after the termination of hostilities in the present war as proclaimed by the President or by a concurrent resolution of the two Houses of Congress. This section shall apply to acts, offenses, or transactions where the existing statute of limitations has not yet fully run, but it shall not apply to acts, offenses, or transactions which are already barred by provisions of existing law.

* * * * *

(d) The provisions of section 35–A of the Criminal Code (18 U. S. C., sec. 80)[12] shall apply to any statement, representation, bill, receipt, voucher, roll, account, claim, certificate, affidavit, or deposition made or used or caused to be made or used for any purpose under this Act or under any regulations pursuant to this Act.

* * * * *

House Report No. 1590, 78th Cong., 2d Sess., p. 28, explains these provisions as follows:

Subsection (b) amends the act of August 24, 1942 (56 Stat. 747). This amendment suspends until 3 years after the termination of hostilities the running of any existing statute of limitations applicable to any Federal offense involving fraud against the United States or connected with the nego-

[12] The statute upon which the instant prosecution is founded.

> tiation, procurement, award, performance, payment for interim financing, cancelation or other termination, or settlement of any war contract.
>
> * * * * *
>
> Subsection (d) deals with the criminal penalties for fraud. It makes clear that the provisions of section 35–A of the Criminal Code (18 U. S. C., sec. 80) also apply to any such statement, representation, or other document made or used or caused to be made or used for any purpose under the act. Section 35–A imposes criminal penalties up to $10,000 in fines and up to 10 years' imprisonment for fraudulent actions involving the Government.

Senate Report No. 836, 78th Cong., 2d Sess., p. 5, similarly emphasizes the fact that the penalty provided by the False Claims Statute is an important enforcement sanction.

The specific reference to the False Claims Statute in Section 19 (d) of the Contract Settlement Act plainly demonstrates to us that Congress intended this important sanction to have the benefit of the suspension of the period of limitations provision in Section 19 (b). But if there is room for any doubt, that doubt must be dispelled by the specific reference in the House Report, first to Section 19 (b) as suspending the period of limitations for offenses involving "fraud", and second to the False Claims Statute as providing criminal

penalties for "fraud", and "for fraudulent actions involving the Government". It is not often that Congress specifically makes its intent so plain. The references on the floor of the House by sponsors of the legislation to the fact that the False Claims Statute provides a criminal enforcement sanction for the Act (90 Cong. Rec. 6060) and to the fact that criminal and civil penalties are provided for "any fraudulent practices" (90 Cong. Rec. 6053) serves only to emphasize the fact that everyone was familiar with the False Claims Statute, and that there would have been little, if any, purpose in providing for the suspension of the limitations period if the provisions were not intended to apply to the most important criminal sanction in the Act. We cannot escape the conclusion that Congress has plainly indicated that the three-year limitation period shall not apply to prosecutions under the False Claims Statute.

The suspension of limitations provision was further broadened in the Surplus Property Act of 1944, 58 Stat. 781, to include any offense committed in connection with the care and handling and disposal of property under the Act. Senate Report No. 1057, 78th Cong., 2d Sess., p. 14, points out that the enforcement provisions of the Act are in addition to "any other civil remedies which the United States may have and of such provisions of the criminal code as relate to *fraud* (18 U. S. C. sec. 80)[13] and conspiracy (18 U. S. C.

[13] The False Claims Statute.

sec. 83)." (Italics added.) Here again the legislative materials make it plain that the same Congress which suspended the limitations period for offenses involving fraud on the United States specifically regarded the False Claims Statute as a "fraud" statute.

As we have said, we do not believe that this Court's decisions compelled the conclusion of the court in the *Marzani* case. But, even assuming the contrary, the legislative materials in respect of the present suspension provision plainly reflect the congressional purpose to suspend the limitations period for violations of the False Claims Statute. Since interpretation of the statutory language must turn on what Congress intended in 1944, there can be little justification for relying on one aid to construction—earlier judicial decisions concerning the meaning of like legislative language—and disregarding the legislative materials which are entitled to great weight. Yet this is what the court of appeals did in the *Marzani* case.

The short of the matter is that we believe the *Marzani* dictum to be in the teeth of the congressional purpose in suspending the period of limitations for frauds on the Government. If the Court, nevertheless, believes that there is sufficient substance to the *Marzani* dictum to warrant resolution of the conflict created by the dictum,

we respectfully submit that the writ should be granted only as to petitioners Gottfried and the corporation (see *supra*, pp. 27–28) and that it should be limited to this question.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

Nos. 561-562

HAROLD GOTTFRIED, JOSEPH FORMAN and WILLIAM STANTON,

Petitioners,

v.

UNITED STATES OF AMERICA.

PETITION FOR REHEARING OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF

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To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Petitioners Harold Gottfried, Joseph Forman and William Stanton respectfully pray for a reconsideration of their petition for a writ of certiorari, denied by your Honorable Court on March 29, 1948.

For a statement of the matters involved, the opinion of the Circuit Court, etc., reference is made to the petition for certiorari and the answering brief of the Government.

Petitioners are conscious of the unusual nature of their request, but, since their liberty is at stake, ask the Court's indulgence to consider the matters below, not heretofore argued or discussed only summarily.

I

The Method of Jury Selection

On the same day on which this Court denied the petition herein, it decided *Moore* v. *New York*. In the latter, it reaffirmed the unconstitutionality of class exclusions in the selection of juries, but rejected an attack on the New York special jury statutes on the ground that they had been sustained, "against a better supported challenge," in *Fay* v. *New York*, 332 U. S. 261. Four dissenting Justices concluded that such panels are "at war with the democratic theory of our jury system," and should be condemned without requiring proof that they are more prone to convict.

In view of the more pervasive jurisdiction of this Court over the Federal Courts (*Fay* v. *New York, supra*), we respectfully urge the Court to reconsider the method of selection of juries practiced in the Southern District of New York, as disclosed by the record herein.

1. It is not denied that such selection is carried on by the clerk of the court, wholly without supervision or direction by the judges of the court.

2. It is not denied that the residents of eight of the eleven counties of the district are not called for jury services unless they volunteer. In the *Report to the Judicial Conference of the Committeee on Selection of Jurors* (Sept., 1942), the Committee spoke out against any clerk using "volunteers." Recommendation II(5) states:

> "Unsolicited requests of persons who seek to have their names placed upon jury lists * * * should not be recognized."

In our original petition we endeavored to show that in view of the character of the excluded counties as contrasted with the included ones, the system of jury selection resulted in class distinction of the character heretofore condemned.

But apart from that question we urge that such a system is potentially a greater menace to a fair trial than the conjectural consequences of the systematic exclusion of, say, women.

The record here sounds a warning note. A former Assistant United States Attorney, who happened to be in the court room, recognized the foreman of the jury as having sat on a case which he had tried for the Government in 1936 or 1937 and asked, "Is that Juror No. 1, your foreman, a Dutchman with the first name Van something-or-other from the phone company?" (5195).* Inquiry of another Government counsel in that case revealed that he recalled this juror and said, "Yes, he was the guy who would not listen to the defense counsel; he turned his back" (5343-4). Further investigation disclosed that this juror served in 1933, 1935, 1938, 1942 and 1944 (5702-8), in addition to his service here early in 1947. The three counties from which jurors are actually called are among the most populous counties in the United States. It may be that the systematic *calling* of this juror was entirely regular. But in view of the clerk's exclusion of jurors from the up-State counties, and his inclusion of volunteers, both without court order, the suspicion will not down that other irregularities may exist. The jury system should be above suspicion. The United States Attorney's office has boasted of its record of convictions (*New York Times*, Feb. 3, 1947, p. 14, col. 2, "Reports 99.1% Convictions"). Were they obtained from juries properly selected?

Only a defendant with an extremely long purse could afford to make a comprehensive investigation of the actual composition of the jury list. We do not suggest that either this Court or the lower courts should undertake to do so. We do believe that visible and open violations of the requirements for jury selection should be condemned rather than condoned. To that extent, at least, it should be borne

* References are to folios. When italics are used they are supplied.

home to the clerks that there are requirements of law to which they must adhere scrupulously.

The clerk's suggestion that the reason for the exclusion of potential jurors from other counties is to save the Government mileage fees hardly needs comment. As Mr. Justice Jackson said in another connection, "it savors more of the publican than of the guardian." (*Connecticut Mutual* v. *Moore,* March 29, 1948.)

The clerk's further suggestion that these residents are spared discomfort and expense is no more impressive. If the jury list were as broad as it should be, no individual need be called frequently. Such service is a small and necessary price for citizenship in a democracy. Petitioner Gottfried volunteered for service during the war and thereby enabled his employees to steal from him (Pet., p. 4), as well as accuse him.

Petitioners have been deprived of the essential requirements of trial by a jury of their vicinage. This right was so prized by the people of the Revolution that they added the Sixth Amendment to the safeguards already provided in the Constitution. Congress has jealously attempted to preserve this right even in cases where the Constitution may not require it. But, further, petitioners have been subjected to trial by a jury specially selected in a manner neither authorized nor contemplated by Congress. Whatever may be the status under the Fourteenth Amendment of special juries [1] authorized by state legislatures, such juries have no place in the Federal system. When they creep into the practice of the clerks in metropolitan districts, through the diffusion of authority among the judges, it is for this Court to point out the error and correct the evil.

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[1] Severe criticism of special juries can be found in Bentham, e.g., "Principles of Judicial Procedure", ch. 24 (2 Works, Bowring ed. [1843]).

II

The Statute of Limitations

Our discussion of the statute of limitations issue failed to point out the public importance of having it authoritatively settled. We therefore respectfully ask the Court to consider the following.

The Suspension Act is applicable to the millions of statements filed by individuals and corporations with the various government departments in the course of the war, in connection with rationing, allocations, price control, and the like. The investigation of these statements must necessarily present a monumental task. If, as was held in the *Marzani* case, the three-year statute is applicable, then it follows that statements made prior to that time should not be investigated, and that those near that time should be investigated promptly, if at all.

It seems probable that the volume of cases affected by the decision will be substantial. We know of three indictments in the Southern District of New York which have not been tried because of the pendency of this petition. There are other decisions, e.g., *U. S.* v. *Agnew*, 6 F. R. D. 566 (D. C. E. D. Pa.); *U. S.* v. *Raphael*, ... Fed Supp. ..... (D. C. E. D. N. Y. ....., Mar., 1947).

It is also reasonable to infer that many cases will be brought in the District of Columbia, in view of the volume of such statements made to officials in Washington or filed with them. It is hardly conceivable that the judges of the court of that district would ignore the *Marzani* opinion, even if the Government were correct in its contention that it is only a dictum. The fact is that the *Marzani* opinion is elaborately considered, based upon legislative history and decisions of this Court (which unfortunately were not brought to the attention of the Court of Appeals for the Second Circuit), persuasive in reasoning, and authoritative in manner.

We are advised that counsel for *Marzani* have filed a petition for re-hearing which is still pending. Surely, that Court considers its disposition of the earlier counts as a decision. Construction of the statute by this Court would expedite decision and assure even-handed justice.

We do not undertake here to answer the Government's criticism of the merits of the *Marzani* opinion. Even a cursory reading of the opinion shows that the Government's argument was carefully considered. Since the grounds on which *Marzani* is based were not brought to the attention of the Court of Appeals for the Second Circuit it seems likely that in other circuits more weight will be attached to *Marzani*. Only this Court can provide an authoritative answer, and certiorari should therefore be granted.

III

The Stanton "Confession"

We fear that our summary discussion of the circumstances surrounding the alleged confession may have failed to convey the true impact of these circumstances. We therefore respectfully ask that the fuller statement which follows be considered.

Stanton had been questioned about an alleged bribe in connection with his Pure Rock investigation as far back as September and December, 1944 (2738-43, 3063-8, 3072-3). On these occasions he had consistently denied any wrongdoing (3069, 3073). He was then already represented by the attorney who tried the instant case on his behalf (2737-8).

In 1945 Stanton was a prisoner in the Federal Penitentiary at Danbury, Connecticut (2271). On June 1 of that year, a writ of habeas corpus ad testificandum to the warden of that institution issued out of the District Court for the Southern District of New York which directed Stanton's production on June 8 for testimony before a grand

jury and his return to Danbury "*immediately*" thereafter (Def. Ex. XX).

On June 6 Stanton was transferred to the Federal Detention House in West Street, New York City (3113).[2] Two days later, on June 8, he was taken to the office at the Federal Courthouse of an Assistant United States Attorney, Bender. As the stenographic record of this interview (Gvt. Ex. 51) reveals, Stanton was repeatedly advised that he was allowed to refuse answers *only* on constitutional grounds (7040, 7043, 7064), and that failure to answer nonincriminating questions would expose him to "punishment for obstruction of justice" (7039). At the very outset, Stanton requested permission to consult his attorney of record before answering questions, but was told that he had no right to do so (7040). As a result of these admonitions he consented to answer a line of general questions; but he again requested counsel and refused to answer when the Pure Rock matter was brought up (7062-7); and it was only after he had been subjected to further pressure that he finally placed his refusal "on the ground that it might incriminate without counsel, without legal advice" (7068).

Produced before the grand jury later the same day, Stanton once more refused to testify on the Ellenville matter without the advice of his attorney (Gvt. Ex. 52). At the request of an Assistant United States Attorney he was then instructed by the foreman that he was not allowed to reveal his appearance before the grand jury to anybody, and that he was under a duty to conceal it even from his counsel (7093-5).

Stanton was not again taken before the grand jury (6020) which continued to be in session (6038-9), or "immediately" returned to Danbury as directed by the terms of the writ, but was held for two more weeks at the West Street De-

[2] On that day Stanton received a visit of his attorney at the detention house; but neither he nor his counsel knew on what process and for what purpose he had been transferred (2744-7, 3118, 2272-82). Efforts to find out about these matters made by Stanton's attorney the same day remained unsuccessful (2748-51).

tention House. True, the return endorsed on the writ, upon which apparently a judge was later asked to discharge the process, purports to set forth that Stanton was "produced in court" on June 11, 14, 15, 16, 18 and 20 (Def. Ex. XX). *But it is uncontroverted that the return is false.* Stanton was actually subjected to further questioning only in Bender's office, and that took place apparently on four of these dates (2258-9, 3000, 3006) and also on June 13 (6176, 6187-8, 6264), Stanton having in each instance been brought from West Street to the office of the United States Attorney at Bender's request (3127-8, 5969-72).

On June 14, while one of these interrogations was going on, Stanton's counsel called at Bender's office, but was denied access and refused any appointment with Bender prior to June 19 (2751-6).

Contrary to standing instructions (3130-5), the deputy marshals charged with Stanton's custody were not allowed to enter Bender's room with their prisoner (3099, 3103, 3229, 6178, 6257). Nor were any stenographers or other neutral persons present during any of the interrogations between June 8 and June 16. Only the statements of interested witnesses, Bender and two federal investigators on the one hand, and Stanton and his wife on the other, throw any light on what happened on these occasions, and their testimony, as was to be expected, is in hopeless conflict.

Stanton asserts that he was threatened with indefinite detention in West Street (2343-4),[3] contempt of court proceedings (2314-22),[4] a transfer from Danbury to a less comfortable institution (2328-30) and the blocking of his parole (2331-2); and that it was only because of his desire to be returned to Danbury that he gave in and on June 16

[3] This is confirmed by Mrs. Stanton (2179-80).

[4] Remarks about a consultation with the court in advance of an intended second appearance of Stanton before the grand jury, which were exchanged in Stanton's presence in the grand jury room on June 8 between the foreman and an Assistant United States Attorney (7093), may well have caused such fears.

finally consented to make whatever statement Bender wanted to extract from him (2343-4). Mrs. Stanton, who on June 14 had been taken in Kingston by two investigators acting at Bender's direction and brought by automobile to New York City, testified that she advised her husband to make a false confession in order to secure his release from West Street (2172).

Bender and the investigators, of course, emphatically denied that any threats were made. According to them, Stanton offered as early as June 11 to make a statement in the event that he should obtain certain information from his wife (2786-7), and told them on June 14 that he was definitely willing to confess, allegedly because Mrs. Stanton had indicated that Forman had not provided for her (2981-2).

But this version fails to account in any way for the sudden decisive shift in Stanton's position between June 8 when the transcript records him as having categorically refused to answer any question, and June 11 when he allegedly offered to confess after consultation with Mrs. Stanton.

Moreover, also according to these witnesses of the prosecution, Stanton asked, after an interview with his wife in West Street on June 14, to be taken to Bender's office for questioning (2791, 6196), but upon his arrival there at once requested and was granted one or two days to prepare himself (2819, 6142-3). That leaves entirely obscure why Stanton was held in Bender's office for several hours thereafter (2816-9), why it became necessary on two occasions to send Mrs. Stanton out of the room for extended periods of time (6142, 2823), and why Bender refused that very afternoon to see Stanton's counsel (2751-5). It remains equally mysterious why it became necessary to bring Stanton to Bender's office the day before and the day after this interview and what occurred at these times.

In an effort to picture the statement taken on June 16 as the first complete account of the facts given to them by Stanton and as wholly spontaneous, Bender and the two

investigators claim that there was no discussion in the absence of the stenographers and no colloquy off the record on that day (2980, 3104, 6031). But their testimony as to the time occupied by the questioning on June 16 is in bad conflict (6209-11, 6274-82, 3247-8, 3252, 6035), and the transcript shows on its face that it was carefully rehearsed.[5] Moreover, one of the investigators admitted that "various parts of the government's case"—which could hardly have consisted of anything but statements by Long—had previously been imparted to Stanton (2786).

In any event, the uncontroverted facts alone have an unsavory flavor of star chamber proceedings.

The writ ad testificandum did not authorize any questioning of Stanton outside of the grand jury room and still less his being shuttled back and forth between West Street and the office of the United States Attorney for secret interrogations. Indeed, we believe that such measures could not be authorized even by a judge. This abuse of process is particularly reprehensible because committed by an officer who had a special responsibility for the proper execution of judicial mandates. *United States* v. *Scroggins,* Fed. Cas. No. 16,244 (C. C. N. D. Ga., 1879).

Moreover, the situation was inherently coercive. Bender in fact had usurped control of Stanton's movements from and to the courthouse and of the length of his detention in West Street. The mere existence of this power, whether referred to in words or not, carried the threat that the return to Danbury might be indefinitely postponed.

The irregular absence of the deputy marshals during the interviews, the steps taken to obtain the statement without

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[5] According to the statement Stanton was requested by the Albany O.P.A. office in connection with his application for employment to fill out a form which he had already filed some months earlier with the Civil Service Commission (3362). The next question anticipates the rather surprising and unusual reaction that he resented this request and allegedly even went so far as to complain to Forman about it (3363). Another example is Stanton's explanation about the denomination of the bills allegedly given to him by Forman, which was not called for by any question reflected in the transcript (3420).

the knowledge of Stanton's counsel, and most of all the failure to produce Stanton before the grand jury after his confession complete the picture of a secret inquisition.

Finally, Stanton was under no legal duty to make any statement to Bender, did not become liable to punishment for his refusal to do so, had a perfect right to consult counsel before volunteering any answer and to freely discuss his appearance before the grand jury with his attorney; and *he was misadvised by the United States Attorney as to his legal rights on all these points.*

> *"The Constitution does not contemplate that prisoners shall be dependent upon government agents for legal counsel and aid, however conscientious and able those agents may be.* Undivided allegiance and faithful, devoted service to a client are prized traditions of the American lawyer. *It is this kind of service for which the Sixth Amendment makes provision."* (*Von Moltke* v. *Gillies,* L. Ed. Advance Opinions, Vol. 92, p. 286 at p. 297, decided January 19, 1948.)

If a free man were forcibly brought before a prosecuting officer on five or six consecutive occasions, misled as to an alleged testimonial duty, threatened with punishment for failure to answer, and during all this time prevented from consulting with counsel and held under conditions which only yielding could bring to an immediate end, the conclusion would be inescapable that a confession thus extracted could not be used. Indeed, such a procedure would obviously fall within the condemnation of *McNabb* v. *United States,* 318 U. S. 332 (1943), and would squarely violate Criminal Procedure Rule 5 which requires an accused to be advised "that he is not required to make a statement," and "of his right to retain counsel," and to be allowed "reasonable time and opportunity to consult counsel." It is true that Rule 5 in terms only contemplates the situation of a person just placed under arrest. But Stanton's pre-existing status as a prisoner did not justify any lesser safeguards in connection with a new charge. On the contrary, his helplessness called for increased fairness and

zeal in the protection of his legal rights. *United States* v. *Bayer,* 156 F. (2d) 964 (C. C. A. 2d, 1946), rev'd on other grounds 331 U. S. 532.

The disregard of civil rights and fair procedure practiced by the Government for the purpose of securing this "confession" is greater than that condemned in *In re William Oliver,* Oct. Term 1947, decided March 8, 1948.

A conviction thus obtained should not be allowed to stand in any case where the stake is personal liberty.

Respectfully submitted,

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April 7, 1948.

IT IS HEREBY CERTIFIED that the within petition for rehearing is presented in good faith and not for delay, and that it is restricted to the grounds set forth in Rule 33 of the Rules of the Supreme Court of the United States, as amended.

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April 7, 1948.